UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed December 23, 2003
03-7837

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23rd day of December two thousand three,

Present:

HON. JOHN M. WALKER, JR.,
Chief Judge,
HON. AMALYA L. KEARSE,
HON. JOSÉ A. CABRANES,
Circuit Judges.

ANDREW EGRI, *et al.*,

Plaintiffs,

NANCY BURTON,

Contemnor-Appellant,

—v.—

CONNECTICUT YANKEE ATOMIC POWER CO., *et al.*,

Defendants-Appellees.

Appellees move for summary affirmance of a district court order finding attorney Nancy Burton in contempt of court for violating a permanent injunction issued by the district court in the above-captioned case. The violation occurred when Ms. Burton scheduled depositions in the *Warmsley* action following the district court's remand of that action to state court in December 2002. Upon due consideration, it is ORDERED that the appellees' motion is granted. In light of this Court's July 1, 2003 summary order upholding a prior order holding Burton in contempt for nearly identical violations of the district court's injunction, the issues presented by this appeal are frivolous. *See In re Andrew Egri*, Docket No. 02-7227(L), 2003 WL 21510422 at *5-*8 (2d Cir. July 1, 2003); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (an appeal is frivolous if it presents an indisputably meritless legal theory or clearly baseless factual contentions).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: OLIVA M. GEORGE
Oliva M. George, Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Filed July 1, 2003
3:02CV400 (AHN)

ANDREW J. EGRI, EDWARD MUNSTER and
NEIGHBORS OPPOSED TO RESIDENTIAL ATOMIC DUMPS

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY, TOWN OF HADDAM BOARD OF SELECTMEN and ALAN PASKEWICH, In His Capacity as Town of Haddam Building Official

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RULING AND SECOND ORDER OF CONTEMPT

This case concerns the on-going efforts of Ms. Nancy Burton, attorney for Plaintiffs in this case and in several related lawsuits, to oppose the construction of a nuclear-fuel storage site in Haddam, Connecticut, by Defendant Connecticut Yankee Atomic Power Company ("Connecticut Yankee"). On March 15, 2002, the court granted a Permanent Injunction proscribing her from, among other things, filing or prosecuting lawsuits that interfere with Connecticut Yankee's construction of the storage site. On July 1, 2002, the court found Ms. Burton in con-

tempt of the Permanent Injunction and awarded Connecticut Yankee $171,546.80 in attorney's fees.

Connecticut Yankee now moves for contempt a second time, claiming that Ms. Burton's continued prosecution of *Warmsley et al. v. Connecticut Yankee Atomic Power Co.*, Conn. Super. Ct. No. CV 02 98136 ("*Warmsley*"), in state court violates the Permanent Injunction. A hearing was held on this motion on June 11, 2003.[1] For the reasons discussed below, the court grants the Motion for Contempt [Doc. # 137] and imposes additional sanctions on Ms. Burton.

BACKGROUND

I. *Procedural History*

On January 29, 2002, the court entered a consent order that fully and finally adjudicated an action brought by Connecticut Yankee on November 21, 2001, entitled *Connecticut Yankee Atomic Power Company v. Town of Haddam, et al.*, Case No. 3:01CV2178(AHN) (the "Related Action").

On March 5, 2002, the court granted Connecticut Yankee a Temporary Restraining Order in the *Egri* litigation, which states in pertinent part:

> Plaintiffs, their successors, assigns, agents and attorneys and all persons with notice of this Temporary Restraining order, are hereby restrained from taking any action that challenges the validity of, or delays, prevents, impairs or interferes with implementation of the Building Permit or Connecticut Yankee's construction, implementation or operation of the ISFSI [i.e., independent spent fuel storage

[1] This hearing was originally scheduled to occur on June 2, 2003, but was rescheduled after Ms. Burton failed to appear.

> installation], other than by direct appeals of this Court's Order or other Filings in this or the Related Action.

Egri et al. v. Connecticut Yankee Atomic Power Company et al., Case No. 3:02CV400 (AHN), Temporary Restraining Order (March 5, 2002) at 3. At this time, the court explicitly warned Ms. Burton that the Temporary Restraining Order precluded her from filing additional lawsuits to challenge Connecticut Yankee's construction of the ISFSI:

> THE COURT: Ms. Burton . . . you should be on notice and aware that by the signing of this temporary restraining order, you are going to be restrained by virtue of my signature on this order, from filing any further lawsuits; that is to say, this lawsuit that you just made reference to that you intended to take up to Middletown to file . . . you can't file it once I sign this order.

Egri et al. v. Connecticut Yankee Atomic Power Company et al., Case No. 3:02CV400 (AHN), Transcript of Conference on Application for Temporary Restraining Order (March 5, 2002) ("March 5 Tr.") at 25. The court reiterated this warning when answering a question from Attorney Burton:

> THE COURT: [Y]ou are restrained from doing anything now, that challenges or delays or interferes with this building permit. So that if this action which you propose to file in Middletown tomorrow comes within the ambit of that language, yes, you are restrained from doing so. You can't file the action.

Id. at 32-33.

On March 15, 2002, after hearing extensive testimony and argument, the court granted Connecticut Yankee's Application for Temporary and Permanent Injunction (the "Permanent Injunction") pursuant to 28 U.S.C. § 1651, the All Writs Act. In so ruling, the court concluded that a "Permanent Injunction was necessary and appropriate in aid of this Court's jurisdiction in the [the Related Action]," and found that:

> D. Connecticut Yankee would suffer irreparable harm if the requested permanent injunction did not issue because it would suffer further delays in its ongoing decommissioning process;
>
> E. Other actions challenging the validity of the Order (or any actions taking in accordance with the Order) in any other judicial or administrative forum would violate the order, frustrate its implementation, or undermine this Court's jurisdiction in the Related Action;
>
> * * *
>
> H. A permanent injunction is necessary to ensure the integrity and finality of the Order, and to prevent frustration of its implementation. . . .

Eari et al. v. Connecticut Yankee Atomic Power Company et al., Case No. 3:02CV400 (AHN), order Granting Permanent Injunction (March 15, 2002) at 2. Using language identical to that appearing in the Temporary Restraining Order, the Permanent Injunction continued to prohibit Ms. Burton from filing new lawsuits or administrative challenges:

> Plaintiffs, their successors, assigns, agents and attorneys, and all persons with notice of the permanent injunction, are hereby permanently enjoined

> from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the Order, including the Building Permit issued thereunder, other than by a direct appeal of this Court's Order or other filings in this action or in the Related Action.

Id. at 3. The *Egri* litigation is presently on appeal before the Second Circuit Court of Appeals.

On July 8, 2002, the court concluded that Ms. Burton had violated the Permanent Injunction by, among otherr things, instituting and prosecuting *Warmsley et al. v. Connecticut Yankee Atomic Power Co.* (Order of Contempt dated July 8, 2002.) In so ruling, the court made the following finding:

> Attorney Burton represents Plaintiffs in *Warmsley, et al. v. Connecticut Yankee Atomic Power Company*, 3:02cv768 (AHN), which seeks "[a] temporary and permanent injunction to enjoin construction activities associated with the [Independent Spent Fuel Storage Installation] on lands once owned by Venture Smith."

Id. Based on this finding, among others, the court determined that Ms. Burton's actions violated Paragraph 3 of the Permanent Injunction, which forbids her "from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the order, including the Building Permit issued thereunder, other than by a direct appeal of this Court's Order." Accordingly, the court found Ms. Burton in contempt for violating the Permanent injunction and awarded $171,546.80 in attorney's fees to Connecticut Yankee. (Order dated July 24, 2002.)

II. *Findinas of Fact Relevant to the Instant Motion for Contempt*

In prosecuting *Warmsley* in state court,[2] Ms. Burton issued notices of deposition dated December 13, 2002, and December 17, 2002, to representatives of Connecticut Yankee and the Connecticut Historical Commission. She also issued a Subpoena Duces Tecum to Russell Mellor, a former officer of Connecticut Yankee, on December 17, 2002. Connecticut Yankee and the State of Connecticut moved to quash the depositions and alerted the state court to the Permanent Injunction.

The Superior Court for the State of Connecticut (Jones, J.) (the "state court") held a hearing on December 20, 2002, to consider the various issues presented by Ms. Burton's continued prosecution of *Warmsley*. During this hearing, Connecticut Yankee explained to the state court that the Permanent Injunction remained in effect. Consequently, the state court refused to permit any further proceedings in *Warmsley* until the District Court ruled on whether Mr. Burton's continued prosecution of *Warmsley* constituted a violation of the Permanent Injunction. (Transcript of *Warmsley* state court proceeding, December 20, 2002, at 34.)

Ms. Burton then sent this court a letter dated May 8, 2003, requesting that the court "confirm" that it had no jurisdiction over *Warmsley* and the continued prosecution thereof in state court. On May 9, 2003, without waiting for the court's response, Ms. Burton issued an Amended Notice of Deposition and a Subpoena Duces Tecum directed to John Shannahan, Historic Preservation Officer for Connecticut. Connecticut Yankee filed a Motion to Quash in state court.

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[2] The *Warmsley* case was originally brought in federal court, but later remanded to state court on December 10, 2002.

STANDARD

A court's inherent power to hold a party in civil contempt may be exercised when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of the noncompliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply. *See EEOC v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1178 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986). The Second Circuit has defined a "clear and unambiguous order" as one that leaves "no uncertainty in the minds of those to whom it is addressed, who must be able to ascertain from the four corners of the order precisely what acts are forbidden." *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995) (internal quotation marks omitted). It is not necessary to find willfulness to adjudge a party in contempt. *Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 39 (2d Cir. 1989).

DISCUSSION

I. *Civil Contempt*

The court finds that the elements of civil contempt are easily satisfied in this case. First, there is no question that the underlying order at issue here is clear and ambiguous. The plain language of the Permanent Injunction enjoins Ms. Burton, among others, from "seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the [construction of the storage site]." *Egri et al v. Connecticut Yankee Atomic Power Company et al.*, No.

3:02CV400 (AHN), Order Granting Permanent Injunction (March 15, 2002) at 3.

Second, the court finds that the evidence of Ms. Burton's noncompliance is clear and convincing, and that she has not made diligent efforts in a reasonable manner to comply with the Permanent Injunction. Ms. Burton, as the Plaintiff's attorney of record, is knowledgeable about the Permanent Injunction, and she has been previously found in contempt for instituting and prosecuting the *Warmsley* suit. (See Order of July 8, 2002.) Her efforts to advance discovery by issuing deposition notices or subpoenas—with the ultimate goal of securing a favorable judgment for her clients—contravene the Permanent Injunction's clear proscription against "seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the order." *Id.* As a seasoned attorney adverse to Connecticut Yankee in several related suits, Ms. Burton cannot plausibly maintain that she did not understand that the proscription against "seeking a judgment or administrative ruling" included the prosecution of suits such as the *Warmsley* litigation. Furthermore, her decision to pursue this discovery without awaiting the court's response to her letter of May 8, 2003, underscores her willfulness in engaging in this proscribed course of conduct.

II. *Sanctions for Ms. Burton's Contempt*

In light of Ms. Burton's continued disregard for the Permanent Injunction and the court's previous finding of contempt, the court has "broad discretion to fashion an appropriate coercive remedy" based on the nature of the harm and the probable effect of alternative sanctions. *See N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 857 (2d Cir. 1984); *see also EEOC v. Local 28 of Sheet Metal Workers Intern. Ass'n*, 247 F.3d 333, 336 (2d Cir.

2001). A civil contempt sanction may serve either to coerce the contemnor into future compliance with the court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance. *See United States v. United Mine Workers of Amer.*, 330 U.S. 258, 303-04 (1947). A sanction may be both coercive and compensatory. *Id.*

When imposing a coercive sanction, a court should consider: "(1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and the consequent seriousness of the sanction's burden." *Dole Fresh Fruit Co. v. United Banana co.*, 821 F.2d 106, 110 (2d Cir. 1987). Similarly, while compensatory sanctions are appropriate to compensate a complainant for harm suffered due to contumacy, proof of pecuniary loss is not required to support a civil contempt fine. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-56 (1932).

In addition, it is appropriate for the court to award the reasonable costs of prosecuting the contempt, including attorney's fees, if the violation of the decree is found to have been willful. *See, e.g., Manhattan Indus., Inc. v. Sweater Bee by Banff Ltd.*, 885 F.2d 1, 8 (2d Cir. 1989). Contempt is willful where the contemnor has actual notice of the court's order, was able to comply with it, did not seek to have it modified, and made no effort to comply. *See King v. Allied Vision Ltd.*, 919 F. Supp. 747, 753 (S.D.N.Y. 1996).

CONCLUSION

Based on the hearing held on June 11, 2003, and the materials submitted by the parties, the court finds that Ms. Burton has again willfully violated the Permanent Injunction by prosecuting the *Warmsley* litigation. Accordingly, the court grants Connecticut Yankee's Motion for Contempt [Doc. # 137] and orders the imposition of the following sanctions to coerce Ms. Burton's compliance with the Permanent Injunction as well as to compensate Connecticut Yankee for its expense in bringing this motion:

1. Ms. Burton shall withdraw within three days of this Order's issuance all notices of deposition and any other documents served by her for the purpose of prosecuting *Warmsley, et al. v. Connecticut Yankee Atomic Power Company*, Conn. Super. Ct. No. CV 02 98136.

2. Three days after this Order has been issued, Ms. Burton shall be subject to an escalating sanction of $1,000.00 for each 24-hour period in which she has not withdrawn any document served by her for the purpose of prosecuting *Warmsley, et al. v. Connecticut Yankee Atomic Power Company*, Conn. Super. Ct. No. CV 02 98136. The same escalating sanction also shall apply if Ms. Burton serves or files any new document that continues her prosecution of the *Warmsley* litigation.

3. Ms. Burton shall pay $2,500.00 to compensate Connecticut Yankee for reasonable attorney's fees incurred in bringing this Motion for Contempt.

SO ORDERED this 30th day of June, 2003, Bridgeport, Connecticut.

ALAN H. NEVAS
Alan H. Nevas
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7837
Filed February 17, 2004

ORDER

Before: Hon. John M. Walker, Jr., Chief Judge, Hon. Amalya L. Kearse, Hon. Jose A. Cabranes, Circuit Judges

IT IS HEREBY ORDERED that the motion be and it hereby is Denied.

FOR THE COURT

Roseann B. MacKechnie, Clerk
By

Laura Bass Penn, Motions Staff Attorney

2-17-04
Date

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIV. NO. 3:02CV768 (AHN)
DECEMBER 20, 2002

DAVID WARMSLEY *et al.*

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

The plaintiffs move to amend their motion for remand to move that the district court order the defendant, Connecticut Yankee Atomic Power Company ("CYAPCo") and its attorneys, John B. Nolan, personally, Alan B. Taylor, personally, Alex Filippo, personally, and their law firm, Day, Berry & Howard LLP (collectively, DBH"), to pay the plaintiffs attorney's fees and costs for wrongful removal of this action from the Connecticut Superior Court to the U.S. District Court.

The wrongful removal by CYAPCo and DBH occurred without cause in their assertion of a non-existing federal question and such act was malicious and vexatious and motivated by a bad-faith campaign to destroy and impair

a cultural and archaeological resource of great importance to the nation in pursuit of an illegal scheme to site a high-level radioactive waste dump upon the Broteer-Venture Smith Archaeological Site.

Costs and attorneys fees are warranted for the following reasons:

1. The complaint filed in the Superior Court of the State of Connecticut on April 17, 2002 alleges violation of the Connecticut Environmental Protection Act, Connecticut General Statutes §22a-19a.

2. The complaint does not allege a federal question.

3. There is no diversity of citizenship among the parties.

4. CYAPCo and DBH removed the case to the U.S. District Court on May 5, 2002 asserting federal question jurisdiction under the All Writs Act, 28 U.S.C. §1651.

5. The All Writs Act does not provide an independent basis for federal jurisdiction to warrant lawful removal of a case brought in the state court alleging a state law issue.

6. When CYAPCo and DBH removed this case to the federal court, they did so without legal cause and with malice in order to frustrate the rights of the plaintiffs in this public interest action to protect and preserve the Broteer-Venture Smith Archaeological Site from acts of unreasonable destruction and impairment pursuant to the laws of the State of Connecticut.

7. On December 10, 2002, seven months later, the U.S. District Court ordered the case remanded to the Connecticut Superior Court in recognition of the complete absence of federal subject matter jurisdiction.

8. The malicious and wrongful motives of CYAPCo and DBH have been manifested throughout the course of the proceedings in this case in the U.S. District Court by such acts as the following:

a. Filing a knowingly false denial in their answer to the complaint (paragraphs 20, 21, 27, 28) that Broteer-Venture Smith (c.1729-1805) owned the site in question and that CYAPCo's conduct will destroy and impair the site;

b. Vexatiously resisting the plaintiffs' rights in discovery to inspect the site to prepare an A-2 survey of the Broteer-Venture Smith Archaeological Site, a critical component of the plaintiffs' proof;

c. Wilful destruction of sensitive portions of the Broteer-Venture Smith Archaeological Site notwithstanding recovery of pottery shards and other tangible evidence of Venture Smith's use and occupation of the site in question;

d. Vexatious filing of a motion for contempt against plaintiffs' counsel for *inter alia* instituting the instant action;

e. Continuing to falsely assert jurisdiction of the federal court in this matter to the U.S. Court of Appeals.

9. The plaintiffs seek attorney's fees in the amount of $171,546.

10. The plaintiffs seek costs as a sanction in an amount to cover the costs of restoration of the Broteer-Venture Smith Archaeological Site and its preservation and maintenance in perpetuity, which sum is estimated to exceed $300 million.

11. The plaintiffs intend that such fees and costs as may be imposed upon CYAPCo and DBH be dedicated in whole to a foundation to be established to restore the Broteer-Venture Smith Archaeological Site and provide for its preservation and maintenance in perpetuity as well as to provide a means of educating the public about the life of Broteer-Venture Smith.

A memorandum of law accompanies this motion.

THE PLAINTIFFS

By: _____

Nancy Burton, Esq.
147 Cross Highway
Redding Ridge CT 06876
Tel. 203-938-3952
Fed. Bar No. 10836

CERTIFICATION

This is to certify that a copy of the foregoing was mailed on December 20, 2002 via U.S. Mail, postage pre-paid to the following:

John B. Nolan, Esq.
Day, Berry & Howard LLP
CityPlaceI
Hartford CT 06103-3499

_____